No. 2576

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES B. SMITH, ET AL.,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION OF PLAINTIFFS IN ERROR FOR A REHEARING.

SIDNEY V. SMITH,
Amicus Curiae.

Filed this.....day of April, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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Moved by a deep conviction that an irreparable wrong is about to be worked upon at least one of the plaintiffs in error, the undersigned, as a friend of the court, ventures, at the risk of over-straining its patience, to offer what follows in support of the petition for a rehearing.

The opinion rendered herein conveys the impression that, if the case had been tried by this court sitting without a jury, the result would have been an acquittal. The court recognizes that the difference between the invoice and the out-turn weights indicates but little, since it might be accounted for

by the difference between the methods of weighing or estimating at the loading ports and the method of weighing here, or by the difference between a weight taken on a rising beam and a weight taken on an even beam, which again would largely depend on the care and skill of the operator of the scale.

The court also recognizes that the discrepancy between the amounts shown by Mills' record to have been laden on the barges and the amounts shown by the weighing to have been delivered to the Pacific Mail Steamship Company, might well be accounted for by the system of average bucket weighing on the barges, which afforded room for error owing to the fact that the shovelers had more time to fill the buckets which were weighed than those which were not weighed by reason of the delay incident to the weighing, and that naturally the former would weigh heavier than the latter.

The court also recognizes that if any discrepancies of weights were caused, as they may well have been caused, by the elements, by flooding the coal with water, by incompetence or negligence on the part of the government weighers, or through the adoption of a faulty system, the plaintiffs in error are not answerable criminally, unless they took some part in bringing these things about.

Having come to these fundamental conclusions as to the main features of the case, it is highly improbable that, if this court had tried the case, it would have been led by the testimony to hold that the

plaintiffs in error conspired to bring any of these things about. It would, in all probability, have given but little weight to the testimony coming from discharged and irresponsible servants of the Company, that Mayer upon some occasions years ago put his foot against the rod; that, under the eyes of the government weighers and inspectors, coal was systematically diverted from the scales; that a bent link between two coal cars, also years ago, prevented a correct weighing of two cargoes. And, being confronted with the fact, as was the trial judge, that buckets not properly filled could not be tripped without tearing the lifting appliances on the barges to pieces, this court would almost certainly have rejected the stories of those witnesses who swore to a condition of things in regard to the bucket filling which was simply impossible.

But the court finds in the record some competent evidence tending to support all these charges of improper conduct on the bunkers and barges and to show that the United States was thereby defrauded, and concludes that the verdict of the jury, so far as it was based on this testimony, cannot be reviewed on appeal. For the purposes of this argument only it may be admitted that the jury was justified in finding that fraud was committed both in the weighing of incoming coal and the weighing of the coal on which drawbacks were paid to the Pacific Mail, or rather, that that finding cannot be here reviewed.

But the court goes further than this, and holds that there was sufficient testimony to warrant the

jury in finding that these frauds were brought about by the wrongful concerted action of the plaintiffs in error and others.

As far as James B. Smith is concerned this conclusion of the court must rest upon the proposition, that there was either direct evidence showing his knowledge of the frauds, or some evidence warranting the jury in *inferring* that he knew of the frauds, because, as there was no direct evidence of a conspiracy, the jury could only find a conspiracy in knowledge brought home to Smith of the fraudulent acts.

In regard to the weighing of incoming coal, by what scintilla of evidence, by what process of reasoning or even of unauthorized guessing, can knowledge or notice of or responsibility for any fraudulent acts be imputed to him? Certainly not by any syllable that dropped from any single witness, or by any document appearing in the evidence. Assuredly not by reason of the knowledge, which must be attributed to him, of the difference between the invoice and the out-turn weights, because this difference, as this court finds, indicated nothing, was in accordance with the experience of every importer of coal to this port, and was less in percentage than similar differences experienced by the other importers. If there were nothing in the case but this evidence of occasional improper acts known, done or directed by Mayer, which, taken all together, probably had but a microscopic effect upon the total weights, and with which Smith is by the evidence

in no way connected, this court undoubtedly would hold that the government had made no case.

And such a conclusion would be quite in agreement with the probabilities. During the period covered by this case the Western Fuel Company paid to the government in duties $1,120,553.97 and received a refund of $10,788.58. It is simply inconceivable, that the manager of a large business corporation should have conspired with a tally clerk on the wharf to save for his company this paltry one per cent on the low duty to which coal was subject.

But the court finds that there was testimony tending to show that in discharging coal from the barges into the vessels of the Pacific Mail Steamship Company the buckets weighed were filled to overflowing while the unweighed buckets were little more than two-thirds full; that this practice was pursued continuously and uninterruptedly; that instructions to that effect were given *on at least one occasion* by Mills in relation to another vessel; that the books and records kept by Mills frequently showed a great disparity between the quantity of coal laden on the barges and the quantity of coal discharged therefrom; and that reports showing these discrepancies were made daily to James B. Smith; from all of which the court deduces the conclusion, that there was sufficient evidence to warrant the jury in finding that every one of the

plaintiffs in error was fully cognizant of the discrepancies between the quantity laden on the barges and the quantity discharged therefrom, and of the causes that produced them.

If this theory of the effect of the evidence be correct, it must lead to the remarkable and indeed incredible conclusion that, while the government was defrauded to the extent of $17,495.24 in drawbacks wrongly paid to the Mail Company (U. S. Exhibit 125 C, Vol. 8, p. 2813, and U. S. Exhibit 130, Vol. 8, p. 2866) the Mail Company was defrauded to the extent of $300,000 (p. 497), the value of coal for which it paid the Fuel Company but which it never received. As even in the light thrown upon the transaction by the evidence given on the trial of this case, the Mail Company has never complained of its treatment by the Fuel Company, since on the trial its officers and servants testified on behalf of the defendants to the effect that the weighing on the barges was supervised by the Mail Company's representatives (the Fuel Company having no representative present), and was fairly done, the result of the weighing can only be accounted for in one of two ways: either the theory of fraud is untenable, or else its commission was rendered possible by a wholesale corruption of the Mail Company's agents. The latter theory was the one necessarily adopted by the government on the trial, and was sought to be established by the suggestion that the officers and servants of the Mail Company, from its vice-president and general man-

ager down to its tally clerk on the barges, were *bribed* by the Fuel Company, were in fact bought and corrupted by the paltry Christmas gifts and occasional tons of coal allowed them by the Fuel Company as a matter of ordinary business courtesy.

Passing this consideration, however, the inquiry remains as to whether such notice and knowledge of the alleged fraud was by the evidence so brought home to James B. Smith as to fairly or at all warrant the jury in finding that he was a party to it, and one of a conspiracy to bring it about.

There is not one word in the testimony directly connecting Smith with the matter of weighing on the barges, or indicating that he had any knowledge of the methods there pursued, but, from the court's language, it becomes evident that, in its opinion, the jury was justified in holding that this knowledge was conveyed to Smith by Mills' records or by the reports based thereon made daily by Mills to him. But there was no evidence showing that Smith ever saw Mills' record. He himself testified positively that he never saw it, and, in the absence of contradictory proof, this must be taken as an established fact, and the question is narrowed down to one concerning what notice and knowledge, if any, of improper practices on the barges was brought to him by Mills' reports.

Those reports did, indeed, show frequently great disparities between the quantities laden on and the quantities discharged from the barges, but is it

legally true that this mere showing must have brought to Smith's mind knowledge of the way in which the disparities were produced, or that they were produced by improper practices in the matter of filling the buckets? The disparities totalled only five per cent, and, as this court finds, could well be accounted for by the fact that the shovellers had more time to fill the weighed buckets, by the flooding of the coal with water, or by incompetence or negligence on the part of the government weighers, or by the adoption of a faulty system.

Now, it is earnestly asked, why would not Smith have been justified in thinking as this court thinks, in assuming that the disparities were actually produced by some or all of the causes which this court thinks may have produced them, causes for which he was not responsible and which he could not control? Why was he not justified in treating the whole matter of weighing as something exclusively between the government and the Pacific Mail, in accepting the reports as to the results of the weighing sent him by that company, and basing his charges for coal delivered upon those reports? Is he not entitled to the presumption, inherent in the legal presumption of his innocence, that he had no knowledge of wrongdoing on the part of his subordinates, and was lulled into a feeling of security that the barge weighing was being rightly done by the acquiescence of the government weighers and inspectors and the tally clerks of the Mail Company in what was being done under their very eyes? The

whole system of weighing was devised by the government; Smith's company inherited it when they bought from the Rosenfelds; Mills, the superintendent on the docks and barges, had held the same position for the Rosenfelds. Was it not natural that Smith should assume that practices, which had obtained for years before the Fuel Company purchased, and which had always satisfied the government and all other parties concerned, had been and were still being properly pursued?

But, looking beyond these mere presumptions of innocence on Smith's part, it may be well to enquire more closely into the nature of these reports, what part they played in the business of the Fuel Company, and what knowledge they conveyed to Smith.

In this connection it has been remarked by the court, that

> "it was and is practically conceded that the tonnage discharged from these barges exceeded the ascertained weight of the coal laden upon them by approximately five per cent."

Most respectfully it is urged that the court has here fallen into error. No such concession was ever made on behalf of the defendants at the trial, or by the argument of their counsel in this court. No such concession could in fact have been made, because *the weight of the coal laden on the barges never was ascertained.*

The five per cent alluded to by the court measured the excess of weights returned by the government

weighers over the figures recorded in Mills' books, but there is absolutely nothing in the whole case to show that the figures in Mills' books concerning the weights taken on the barges were correct.

Neither Mills nor any other mortal man ever knew or could have known how much was laden on the barges, nor was there any necessity, in the conduct of the Company's business, for any accurate knowledge on the subject to be obtained or recorded.

As the coal came from the ship's side at the wharf it was taken to the yard and piled, or dumped into the bunkers on the wharf which were used for deliveries to the city trade, or into the "off-shore" bunkers, which were at the end of the wharf and used for deliveries to barges or to schooners. As these different dispositions of the incoming coal were made by Mayer he took notes of the quantities dumped into these various places, which were reported to Mills, who made corresponding entries in his books, so that, if the figures reported were correct, and it may be remarked parenthetically that in the hurry of weighing there was every room and chance for incorrectness, Mills had some knowledge, more or less exact, of how much was piled in the yard and how much was placed in each one of the bunkers.

When it came to the loading of a barge, Mills did the best he could under the circumstances and the system followed, and noted in his book, for

instance, that the contents of an off-shore bunker, of which he assumed that he knew the weight, were placed on the barge. But manifestly he could not know the weight of coal in any bunker. If, as the government contends, coal had been dropped into the bunker without weighing, the bunker held more than his record showed. Or, if part of the contents of a bunker had been delivered to a schooner, he had no means of knowing how much was left, and could only make a guess at it. And if, as sometimes happened, coal from a pile in the yard, or screenings from the wharf gathered after delivery of screened coal to the local trade, were put on the barge without being weighed at all, he could not even attempt to make a guess at the weight so loaded, and wholly omitted to make any note of its delivery to the barge.

So that it fully appears that his entries of weights put on the barges were and could only have been approximate estimates, and the absolute truth of Smith's statement that he regarded Mills' reports to him as mere approximations of the amounts on hand in the yard, the bunkers, and the barges becomes evident, and the deduction is inevitable that these reports gave him no further or other knowledge, and did not inform him of any irregular practice connected with the filling of buckets.

When Mills had thus entered in his book the weights laden on a barge and the amounts weighed out, and compared the two figures, he entered the discrepancy in his book, and made it part of his

report to the office. According to the government's theory of guilt, then, Mills accurately, painstakingly, kept a plain record of that guilt in a book which lay spread on his desk, accessible to any one, and preserved the damning evidence year by year, with no attempt to cover it up or destroy it, so that when this prosecution began, the government was able to lay its hand on the record, photograph its every page, tabulate its every figure, and make it the basis of the only argument possible in favor of the theory of the prosecution. Not only that; he deliberately sent to the office his reports of the amounts in which he had swindled the Pacific Mail, and these reports lay each morning on the desk of the vice-president with no attempt at their concealment.

Not such is the ordinary conduct of men who conspire in dishonesty and crime. That the manager of the Western Fuel Company should have resorted to such crude methods of fraud as were described in some of the evidence in this case, and that, having done so, he should have unnecessarily made and preserved a minute record of his crimes open to the inspection of government officials during a period of nine years, is as inconceivable as that he should have succeeded in defrauding, to the extent of hundreds of thousands of dollars, a great business corporation that, even today, rests content with the treatment it received at his hands.

If it should be said that the argument here made goes to the *weight* of the evidence, and that, while it might have been properly addressed to the jury, it cannot be considered by an appellate court, the answer is confidently made, that it is, on the contrary, an argument dealing with the right of the jury to make *inferences* not warranted by the evidence, and presents, therefore, a question of law pure and simply. For while it is true that the appellate court will not set aside a reasonable inference drawn by the jury from facts proved *(Hyde v. Stone,* 20 How. 170), it is equally true that it may examine the evidence to see whether there was sufficient to justify the conclusions reached by the jury *(Carter v. Ruddy*, 116 U. S. 493), and that, as was well remarked in *Miller v. Palmer,* 58 Md. 459,

> "in order to determine the legal sufficiency of evidence to prove a fact, it is necessary to assume the truth of all the evidence, and add thereto every inference which may be fairly and legitimately drawn therefrom by the jury in the exercise of a reasonable intelligence."

Acting under this simple and practical rule, the court in that case reversed the judgment on the ground that the jury had drawn an inference of fact unwarranted by the evidence.

The same action was had in Kilpatrick v. Richardson, 58 N. W. 932, where it was said:

> "A verdict for negligence may be supported by inferences, but such inferences must be the legal, *probable* and reasonable deductions from proved or conceded facts."

What has been said here is in the attempt to apply this rule by assuming the truth of all the testimony alluded to by the court in regard to improper practices on the bunkers and barges, however incredible or trivial such testimony may be *per se,* and then to ask whether the fact of James B. Smith's guilt may be legitimately drawn therefrom in the exercise of a reasonable intelligence. And, in answer to that question, it is urged that, from the doubtful and disputed facts so supported by some of the testimony and alluded to by the court, no inference can be fairly or legitimately drawn, or could have been fairly or legitimately drawn by the jury, that Smith entered into a conspiracy having for its object the defrauding of the government out of the trivial sums involved in the bunker weighing, or of defrauding the Pacific Mail Steamship Company out of the immense sums involved in the barge weighing. The improbabilities, in either case, are so staggering as to render the inference contended for by the prosecution impossible to a fair and reasonable intelligence.

So viewed, the jury's inference of a guilty knowledge on Smith's part turns out to be merely a wild and arbitrary guess, so grossly improbable as to shock the common sense, and which should now, therefore, it is earnestly contended, be rejected by this court as not warranted by any of the facts in evidence.

The jury before which this case was tried ignored all the considerations which to this court seem to be of controlling importance; gave credence to testimony of the most unreliable character concerning an impossible condition of facts; proceeded upon a supposition for which there was no warrant in the evidence; and reached a conclusion which is at variance with the rules and motives ordinarily governing human conduct and the relations of business men.

From the unfairness of that verdict and the ignominy of the sentence which followed it, the last appeal is to the clearer vision and courageous action of this court.

Dated, San Francisco,
April 17, 1916.

Respectfully submitted,

SIDNEY V. SMITH,
Amicus Curiae.